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No. 99-437

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In The

Supreme Court of the United States

JOSEPH LEHMAN, Secretary,
Washington State Department of Corrections,

Petitioner,

v.

DONALD MACFARLANE and JAMES FOGLE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CASE HISTORY

Washington State prisoner Donald MacFarlane was convicted of unlawful possession of a controlled substance with intent to deliver and on June 24, 1991 he was sentenced by the Clark County Superior Court to serve 72 months in confinement. Washington State prisoner James Fogle was convicted of possession of a controlled substance, and in 1992 he was sentenced by the Pierce County Superior Court to serve 60 months in confinement. They were both unable to afford to post bail and were therefore detained in the respective county jails prior to sentencing. MacFarlane spent 144 presentence days in the Clark County Jail, and Fogle spent 102 presentence days in the Pierce County Jail. Due to the local jail policies of the Pierce and Clark County Jails, they received less earned early release credit for the time they spent in those county jails than they would have received had they been released on bail and later had to serve the exact same amount of time in a state correctional facility, or in other county jails in Washington State. *See, e.g., In re Williams*, 121 Wn.2d 655, 658, 853 P.2d 444 (1993).[1] "Early

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[1] State prisoners in the custody of the Department of Corrections are eligible to earn up to a one-third sentence reduction. The reported facts of *Williams* show that the administration of the King County Jail, located in Seattle, allows pretrial detainees to earn up to one-third time off for good conduct. At the time respondents were in Pierce and Clark County jails, local policy provided that no prisoner charged with or convicted of a felony was eligible to earn as much as a one-third sentence reduction.

While this case was pending in the District Court, Pierce County changed its policy so that now all pretrial detainees in the Pierce County Jail are eligible to earn as much good time

release" credit is made up of two components, "good conduct" and "good performance." "Good conduct" credit is awarded for the absence of misconduct. "Good performance" credit is awarded for affirmative participation in various work or rehabilitative programs. *MacFarlane v. Walter*, 179 F.3d 1131, 1135 n.1 (9th Cir. 1999).

MacFarlane and Fogle filed separate personal restraint petitions in the Washington Court of Appeals, challenging the county jails' early-release policies as violative of equal protection. The Washington Court of Appeals rejected Fogle's petition, and the Washington Supreme Court then granted Fogle's petition for discretionary review. The state supreme court also transferred MacFarlane's personal restraint petition, which was then pending in the Washington Court of Appeals, to the state supreme court, and consolidated the two cases for review. On November 2, 1995 the Washington Supreme Court, in a 5-to-4 decision, rejected the prisoners' equal protection claims. *In re Fogle*, 128 Wn.2d 56, 904 P.2d 722 (1995).

In August of 1996, MacFarlane and Fogle filed habeas corpus petitions in the United States District Court for the Western District of Washington. Their petitions were consolidated. The Magistrate Judge issued a Report & Recommendation recommending that their petitions be denied, and that summary judgment be granted to the Washington Department of Corrections. On June 9, 1997 the District Court issued an order approving the Report

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credit as persons confined in state prisons (up to one-third). CR 39, ER 49-50. Thus, if Mr. Fogle were in Pierce County jail today, his total time spent incarcerated would be less than it was under the local policy in effect when he was there.

and entered judgment for the Department of Corrections. MacFarlane and Fogle appealed.

On May 5, 1999 a panel of the United States Court of Appeals issued a decision which reversed in part and affirmed in part the decision of the District Court. The Court of Appeals held that the county jails' good conduct credit policies violated equal protection, and the jails' good performance credit policies did not violate equal protection. The Department of Corrections' petition for rehearing was denied on June 9, 1999.

REASONS FOR DENYING THE WRIT

1. THERE IS NO CONFLICT BETWEEN *McGINNIS* AND *BEARDEN*. *BEARDEN* STATES THE LAW APPLICABLE TO CASES WHERE INCARCERATION IS AUTOMATICALLY CAUSED SOLELY BY A LACK OF WEALTH. *McGINNIS* DID NOT INVOLVE AUTOMATIC INCARCERATION DUE TO A LACK OF WEALTH,BUT INSTEAD INVOLVED DELAY IN OBTAINING A HEARING THAT *MIGHT* HAVE LED TO RELEASE, PROVIDED THE PRISONER DEMONSTRATED HIS REHABILITATION.

The Washington Department of Corrections contends that this Court's decision in *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983) did not "clearly establish" any right applicable to the habeas petitioners in this case. While the factual setting of *Bearden* is superficially different from that of the present case, this Court described the principle at stake in *Bearden* as "the ***impermissibility*** of imprisoning a defendant ***solely because of***

his lack of financial resources." 461 U.S. at 661 (italics added). That principle is at stake in the present case as well.

Petitioner Lehman contends that it is *McGinnis v. Royster*, 410 U.S. 263, 93 S. Ct. 1055, 35 L.Ed.2d 282 (1973), rather than *Bearden*, that controls this case. Petitioner suggests that because both *McGinnis* and the present case are prisoner "good time" cases, *McGinnis* controls, and tries to distinguish *Bearden* because it is a case about financial inability to pay a fine. But this type of analysis ignores the material facts which make *McGinnis* inapposite and *Bearden* controlling. *Bearden* and this case both deal with situations where a lack of wealth automatically led to having to spend more days incarcerated. *McGinnis* did not.

A. *Bearden* Controls Because It Articulates the Equal Protection Analysis This Court Has Held Directly Applicable To Cases, Like the Present Case, In Which Lack of Wealth Directly Causes Incarceration.

It does not matter that the respondents' lack of wealth in the present case made them incapable of posting bail, whereas the defendant's lack of wealth in *Bearden* made him unable to pay a fine. These factual differences are immaterial. In both cases, the lack of financial resources led directly to the imposition of additional imprisonment.

Bearden held that incarceration must not be imposed on an indigent individual solely because of that person's inability to pay a fine, following a well established line of

cases prohibiting imprisonment imposed solely on the basis of lack of wealth. *See Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed.2d 586 (1970) (unconstitutional for state to add time to maximum prison term solely because defendant involuntarily failed to pay fine or costs); *Tate v. Short*, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L.Ed.2d 130 (1971) (jailing a defendant for involuntary failure to pay fines on non-jail offenses unconstitutionally imprisons "solely because of . . . indigency" just as in *Williams*; *Pruett v. Texas*, 414 U.S. 802, 94 S. Ct. 118, 38 L.Ed.2d 39 (1973) (summarily affirming lower court decision that when defendant was in jail pending appeal "because [he] was too poor to make bond," it was unconstitutional to deny good time for this period simply because his sentence did not technically start to run until after his conviction was affirmed (470 F.2d 1182, 1183 (5th Cir. 1973) (en banc)). In all of these cases, the relationship between the inability to pay, and the imposition of additional incarceration time, is direct and automatic.

The decision below cogently explains why *Bearden* is the controlling case notwithstanding any superficial factual distinctions between a criminal defendant's post-conviction inability to pay a fine imposed as part of a sentence, and another defendant's failure to secure pre-trial release from jail due to an inability to post bail.

> Respondents fail to show that there is any meaningful distinction between the case of a poor person unable to pay a fine, who, as a result, suffers longer incarceration than a similarly situated affluent person (*Bearden*) and the case of a poor person unable to post bail pre-trial who, as a result, suffers longer incarceration than a similarly situated affluent person (*MacFarlane* and

> *Fogle*). *Bearden* erected the framework intended for application where a defendant suffers increased incarceration because of indigency and, thus, is clearly established law governing the issue presented here.

MacFarlane v. Walter, 179 F.3d at 1140. This simple logic, deeply grounded in this Court's precedents, demonstrates the correctness of the Court of Appeals' decision in this case.

B. In *McGinnis*, This Court Applied A Standard Equal Protection Analysis That Is Inapplicable To This Case Because the Principle of Incarceration Caused Directly By Lack of Wealth Was Not At Stake.

Petitioner argues that *McGinnis* is the controlling precedent that should be applied to the present case, and that the Washington Supreme Court's decision rejecting MacFarlane and Fogle's claims is not "contrary to" *McGinnis*. *McGinnis*, however, is not applicable to the present case because *McGinnis* does not deal with a situation in which lack of wealth directly caused incarceration.

Petitioner concedes that this Court in *McGinnis* did not frame the issue as one of "disparate treatment of indigent prisoners." *Petition for Writ of Certiorari*, at 16. In order to try to blunt the constitutional significance of this fact, petitioner then goes on to claim that " . . . the Court in *McGinnis* was well aware that the good time differences at issue resulted in longer incarceration for those in pretrial county jail custody because they could not make bail." This attempt to bootstrap *McGinnis* into a case about lack of wealth causing incarceration must fail: This

Court could not have been "aware" that the good time differences at issue in *McGinnis* resulted directly in extra incarceration, because they did not do so.

Under New York's "complex" sentencing system, each state prisoner "received a series of release dates" upon his arrival at prison. *McGinnis*, 410 U.S. at 265-66.

> Each inmate has both a minimum parole date, which is the earliest date on which he may be paroled at the discretion of the Parole Board, and a statutory release date which is the earliest date he must be paroled by the Parole Board. The minimum parole date is calculated . . . by subtracting the greatest amount of good time that can be earned (10 days per month) from the minimum sentence of an indeterminate term. The statutory release date is calculated . . . by subtracting the greatest amount of good time that can be earned (5 days per month) from the maximum sentence of an indeterminate term.

McGinnis, 410 U.S. at 266 (footnotes omitted).

In *McGinnis* this Court reviewed a claim by New York state prisoners regarding the denial of good time credit toward their *discretionary* minimum parole date under a system where parole was conditioned on a showing of rehabilitation. And yet at the same time this Court explicitly noted that under the New York sentencing statutes the prisoners *were* eligible to receive good time credit toward the prisoner's maximum statutory release date:

> While New York does deny good-time credit for jail time in computing the minimum parole

> date . . . , *it allows such credit* in calculating the statutory release date . . . .

McGinnis, 410 U.S. at 267 (italics added).

There was a denial of good time credit for pretrial incarceration time towards the New York prisoners' discretionary minimum parole date. But since parole in New York was dependent upon a showing of rehabilitation, there was no automatic causal relationship between the denial of good time credit towards the minimum discretionary parole date and having to serve a longer term of imprisonment. Therefore, petitioner is in error in suggesting that *McGinnis* is a case involving incarceration caused directly by lack of wealth.

In contrast to the *indeterminate* New York sentencing system with a parole component, where parole of the prisoner was dependent upon a showing of rehabilitation, the respondents here were sentenced under a wholly *determinate* sentencing scheme in which the length of sentences are known from the outset. Since the enactment in 1984 of the Sentencing Reform Act ("SRA"), Washington State has employed this *determinate* sentencing system in which rehabilitation is completely irrelevant and there is no such thing as parole.

"Before the enactment of the SRA, the [Washington] Legislature adhered to a policy that actual time of imprisonment was best determined by the [Parole] Board." *In re Myers*, 105 Wn.2d 257, 262, 714 P.2d 303 (1986). The system was "rehabilitation oriented, with broad discretion given to the Board of Prison terms and Paroles to fix minimum terms according to a wide ranging set of factors." *In re Whitesel*, 111 Wn.2d 621, 626, 763

P.2d 199 (1988) (footnotes omitted). *Accord, State v. Barnes*, 117 Wn.2d 701, 711, 818 P.2d 1088 (1991).

That old sentencing system was akin to the indeterminate component of the New York sentencing system at issue in *McGinnis*. But the Washington Parole Board was phased out and ceased to exist after 1988. *Myers*, 105 Wn.2d at 262. The new determinate sentencing system was created, with a shift "from rehabilitation to proportionality, equality and justice." *Id.* at 710. Since 1984 rehabilitation has been irrelevant to the determination of the length of a prison sentence in Washington State. *Id.* at 711.

Under the determinate sentencing system, a Washington State prisoner has no uncertainty about when he will be released. Under a rehabilitation-centered indeterminate system, such as the New York system at issue in *McGinnis*, a prisoner *might* be paroled at some unknown point in time, *if* the state parole board concludes that the prisoner has made rehabilitative progress. Under Washington State's determinate sentencing system, the length of a prisoner's sentence is fixed from the moment the sentence is judicially imposed, and is completely unaffected by rehabilitative efforts or results.

While the denial of the opportunity to earn an equal amount of good conduct credit leads *automatically* to more incarceration for prisoners like MacFarlane and Fogle who could not afford to post bail in the trial court, the financial inability to post bail of the *McGinnis* prisoners *did not lead automatically* to their having to serve more time in prison.

The statutory release date, towards which New York prisoners did earn good time credit for their presentence jail incarceration time, is analogous to the determinate sentences imposed upon Washington State prisoners such as respondents Fogle and MacFarlane. For New York prisoners who had been unable to secure pretrial release due to an inability to post bail, the relationship between denial of good time credit towards their statutory release date was direct and automatic. Every day of good time credit awarded automatically shortened by one day their statutory release date. Since the New York prisoners *did* receive good time credit for their pretrial detention time towards their maximum statutory release date, there was no incarceration penalty automatically imposed as a result of their financial inability to post bail prior to trial. Thus the issue present in MacFarlane and Fogle's case simply did not arise, and was not addressed by this Court.

In *McGinnis* this Court relied on the fact that the New York indeterminate sentencing system awarded good time primarily for *rehabilitative* efforts, and that while rehabilitative programs existed in the state prisons, they generally did not exist in the local jails:

> We note, further, that the distinction of which appellees complain [between time served in a local jail as a pretrial detainee and time served after conviction and sentence in a state prison] arose in the course of the State's sensitive and difficult effort to encourage for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society . . . .

> The Commissioner [of the New York Corrections Department] defends this distinction by noting that "state prisons differ from county jails with respect to purpose, usage and availability of facilities." State prisons are "intended to have rehabilitation as a prime purpose and the facilities at these institutions are built and equipped to serve this purpose." The Commissioner cites the presence at state prisons of "educational and vocational services such as schools, facilities, jobtraining programs and related activities." . . .
>
> We pass no judgment on the success or merits of the State's efforts, but note only that at state prisons a serious rehabilitative program exists. County jails, on the other hand, serve primarily as detention centers.

McGinnis, 410 U.S. at 269-271.

This Court held that under a discretionary, indeterminate, rehabilitation-based parole system, "[t]hese significant differences" between prisons and county jails "afford[ed] the basis for a different treatment within a constitutional framework." *Id.* at 271.

> As the statute and regulations contemplate state evaluation of an inmate's progress toward rehabilitation, in awarding good time, it is reasonable not to award such time for pretrial detention in a county jail where no systematic rehabilitative programs exist and where the prisoner's conduct and performance are not even observed and evaluated by the responsible state prison officials. Further, it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.

McGinnis, 410 U.S. at 272-73.

But these distinctions do not exist in Washington State. Under the determinate sentencing system adopted in 1984 by the enactment of the SRA, both jails and prisons "serve primarily as detention centers," and rehabilitation effort and progress is irrelevant to the length of a prison sentence.

Since parole was conditioned upon a showing of rehabilitation in New York, a delay in providing a parole hearing at the minimum parole date would not lead automatically to a longer sentence. For even if good time credit for time served in local jails was credited towards the minimum parole date, since parole was *discretionary*, there was no guarantee that parole would actually be granted on the minimum parole date. And since parole was conditioned upon a showing of rehabilitation that could not be made until the prisoners arrived in state prisons where rehabilitative programs were offered, it was unlikely that parole would be granted until after the prisoner had spent a significant amount of time in a state prison facility.

The rationale of *McGinnis* is completely inapplicable in a state such as Washington where there is a determinate sentencing system, there is no parole, and rehabilitation is completely irrelevant to the question of when a prisoner will be released from prison. In fact, in an earlier decision the Washington Supreme Court **specifically rejected** the relevance of *McGinnis* to good time calculation under Washington's Sentencing Reform Act because when considering prison sentences imposed under the SRA "[r]ehabilitation is irrelevant;" since it "does not rise to the level of a substantial interest under the SRA it cannot justify disparate treatment of offenders." *In re*

Mota, 114 Wn.2d 465, 476, 788 P.2d 538 (1990). Thus the state supreme court held in *Mota* that Washington prisoners must be eligible to earn good time credit for their good conduct during the period of their pretrial detention in a county jail.

In sum, *McGinnis* may be the correct law to apply to an equal protection challenge brought in an indeterminate sentencing State where release from confinement does not automatically occur on the minimum parole eligibility date, and instead depends upon a discretionary official determination that a sufficient showing of rehabilitation has been made. But *McGinnis* is not the correct law to apply in a determinate sentencing State like Washington where release is automatic once a prisoner has served his determinate sentence. *McGinnis* does not control an equal protection claim that the length of imprisonment has been increased ***solely*** because a pretrial detainee's lack of wealth made it impossible for him to bail out of a county jail which did not permit pretrial detainees to earn as much good time as might be earned by a wealthier defendant who posted bail, was at liberty during his pretrial stage, and who later served his entire sentence in a state prison facility.

In *MLB v. SLJ*, 519 U.S. 102, 117 S. Ct. 555, 136 L.Ed.2d 473 (1996), this Court recently reaffirmed the vitality of the holding of *Bearden* and it antecedents. The issue arose in the context of a civil case where the parental rights of a mother had been terminated by the trial court. The question presented was whether the Fourteenth Amendment required the State to accord the parent access to an appeal which would have been available "but for her inability to advance required costs." *MLB*,

117 S. Ct. at 565. Relying upon *Bearden* this Court held it unconstitutional to permit an indigent parent's inability to advance required appeal costs to have the automatic effect of denying her the same type of appellate review that a more affluent parent could obtain.

> As we said in *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 2068-2069, 76 L.Ed.2d 221 (1983), in the Court's *Griffin*-line cases, "due process and equal protection principles converge." The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. [Citation omitted]. The due process concern homes in on the essential unfairness of the state ordered proceedings anterior to adverse state action. [Citation omitted]. A "precise rationale" has not been composed [citation], because cases of this order "cannot be resolved by resort to easy slogans or pigeonhole analysis," *Bearden*, 461 U.S. at 666, 103 S. Ct., at 2069.

MLB, 117 S. Ct. at 565.

Petitioner's focus on the application in *McGinnis* of the rational basis standard is precisely the type of "pigeonhole analysis," that *Bearden* and *MLB* rejected. Petitioner would have this Court view this case simply as a bail/good time case. Such an approach is inconsistent with *MLB*, where this Court recognized that even though *Bearden* involved jail time imposed for inability to pay a fine, its equal protection principle was applicable to a situation where access to an appeal of a parental rights termination order was blocked solely because the parent couldn't pay appeal costs.

Petitioner's unconvincing attempt to place this case and *McGinnis* into the same pigeonhole is highlighted by petitioner's own concession that this Court's *McGinnis* opinion did not frame the issue as one of disparate treatment of indigent prisoners. *Petition for Writ of Certiorari*, at 16. Thus petitioner effectively concedes that the Court of Appeals was correct when it concluded that *McGinnis* was not controlling:

> *McGinnis*, however, decided 12 years before *Bearden*, was not about indigency: although appellees Royster and Rutherford appear to have been unable to post bail because of indigency, 410 U.S. at 266-67, the issue was not framed as one of disparate treatment of indigent prisoners, nor did the Supreme Court so analyze it. . . . The petitioners here, as the Washington Supreme Court recognized, explicitly claim an equal protection violation based on their indigency. This is not to say that the Supreme Court in *McGinnis* could not have treated the case as one about indigency and analyzed the issue in this light, but it did not do so and, therefore, is not on point. It is probably for that reason that the Supreme Court did not mention *McGinnis* when it decided *Bearden*.

MacFarlane v. Walter, 179 F.3d at 1140, n.11.

This is not to say that *McGinnis* is not relevant to some cases involving equal protection challenges to disparate good time credit treatment of subclasses of prisoners. For example, an equal protection challenge to a policy of giving more good time credit to prisoners convicted of property offenses, than to those convicted of violent crimes against persons, would be governed by the

McGinnis rational basis standard. On the other hand, an equal protection challenge to a policy of allowing prisoners of one race to earn good time credit, while denying good time credit to prisoners of a different race, would trigger strict scrutiny, and clearly would not be governed by *McGinnis*.

In sum, there is no conflict between *Bearden* and *McGinnis*, nor is there any conflict between the decision below and *McGinnis*. Thus there is no reason to exercise the extraordinary power of certiorari to review the decision below.

2. THIS CASE IS NOT LIKELY TO BE AFFECTED BY THIS COURT'S DECISION IN *WILLIAMS v. TAYLOR*

Petitioner claims that "[t]his case will be directly affected by any decision this Court renders in *Williams v. Taylor," cert. granted,* 119 S. Ct. 1753 (1999). *Petition for Writ of Certiorari,* at 10. Respondents respectfully submit that this is not so. While this Court's decision in *Williams* certainly will resolve some issues regarding the proper construction of statutory language contained in 28 U.S.C. Section 2254(d), the *Williams* decision is unlikely to either control or provide any significant guidance as to how this case should be decided.

28 U.S.C. Section 2254(d)(1) provides that a writ of habeas corpus shall not be granted to a person in custody pursuant to a state court judgment unless the federal habeas court finds that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States." The first question presented in *Williams* involves the degree of similarity that must exist between a Supreme Court precedent and a habeas petitioner's case, such that the precedent may be viewed as a "clearly established" and "contrary" Supreme Court precedent. That question reads:

> Did the Fourth Circuit err in concluding that, under 28 U.S.C. Section 2254(d)(1), state habeas court's decision to deny federal constitutional claim cannot be "contrary to" clearly established federal law unless it is in "square conflict" with decision of this court that is "controlling as to law and fact"?

65 Crim. L. Rep. 2001 (April 7, 1999).

The Fourth Circuit has ruled that a decision is "contrary to" Supreme Court precedent only when "either through a decision of pure law or application of facts indistinguishable *in any material way* from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent which addresses the identical issue." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (italics added). The panel in *Williams* specifically relied upon the *Green* construction of Section 2254(d)(1) when it denied relief to the habeas petitioner. *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998).

The *Williams* petitioner presented a Sixth Amendment ineffective assistance of counsel claim, and argued that the state court's rejection of his claim was contrary to this Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Of course the

facts of *Strickland* were not *absolutely* identical to the facts of petitioner Williams' case. Finding an insufficient degree of factual identity between the facts of *Williams* and *Strickland*, the Fourth Circuit cursorily decided that Williams was not entitled to any relief under the "contrary to . . . clearly established Federal law" portion of Section 2254(d)(1).[2]

Even if this Court were to adopt the Fourth Circuit's view that a Supreme Court precedent must involve facts which are not materially different from those presented by a state prisoner seeking federal habeas corpus relief,

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[2] If absolute factual identity were required before any state prisoner seeking habeas relief could prevail in a federal court, then virtually no case would ever be able to qualify for a grant of habeas relief under the "contrary to" portion of Section 2254(d). Respondents MacFarlane and Fogle respectfully submit that the Ninth Circuit was correct when it rejected such a "absolute factual identity" construction of the "contrary to" portion of Section 2254(d)(1): "If that were the standard, however, hardly any law would be 'clearly established,' for only cases presenting precisely the same facts could govern later cases." *MacFarlane v. Walter*, 179 F.3d 1131, 1138 (9th Cir. 1999). Moreover, this Court has held in other contexts that a precedent is "clearly established" if it compels a particular result, even though the facts of the precedent may not be identical to the facts of the case before the court. *See Wright v. West*, 505 U.S. 277, 304, 112 S. Ct. 2482, 120 L.Ed.2d 225 (1992) (O'Connor, J., concurring) (applying existing precedent to a different set of facts in a habeas case is not a "new rule" if the factual differences do not change the force with which the precedent's underlying principle applies); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987) (rejecting notion that a right can be clearly established for qualified immunity purposes only if "the very action in question has previously been held unlawful.")

that would not change the result in this case because the *material* facts in this case are not different from the *material* facts in *Bearden*.

The materials facts of this case are those identified by the Court of Appeals below: a poor person, solely by reason of his indigency, faces more incarceration than a similarly situated affluent person. This was true of respondents MacFarlane and Fogle. This was also true of petitioner Bearden. Since the *material* facts of this case and the *Bearden* case are identical, the result in this case will *not* change even if this Court affirms the Fourth Circuit in *Williams* and adopts the Fourth Circuit's test for determining when a state court decision is "contrary to" a "clearly established" precedent of this Court. If this Court rejects the Fourth Circuit's test in favor of some less stringent test for determining when a state court decision is "contrary to" a clearly established precedent of this Court, that also would have no effect on the decision in this case.

The remaining "questions presented" in *Williams* concern a claim of ineffective assistance of counsel, and the proper interpretation of the phrase "unreasonable application of" clearly established federal law.[3] The present

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[3] The third question presented in *Williams* reads:

> Did the Fourth Circuit err in concluding that, under 28 U.S.C. Section 2254(d)(1), state habeas court's decision to deny federal constitutional claim cannot involve "unreasonable application of" clearly established federal law unless state court's decision is predicated on interpretation or application of

case does not involve any claim of ineffective assistance of counsel. Nor does it involve any construction of the "unreasonable application" portion of Section 2254(d)(1). In the present case the Court of Appeals expressly declined to address the issue of whether the state court's denial of relief was "an unreasonable application of" Supreme Court precedent, because it was wholly unnecessary to address that question. Although recognizing that there might be some overlap between the "contrary to" and the "unreasonable application of" provisions, the Court of Appeals found it unnecessary to decide whether the Washington State Supreme Court's decision fell into Section 2254(d)(1)'s second category of cases where relief may be granted, as well as the first.

> The Washington Supreme Court's failure to apply *Bearden*, and its resultant decision that the county jails' good-conduct policies did not violate equal protection, was "contrary to . . . clearly established . . . Federal law" within the meaning of 28 U.S.C. § 2254(d). Such a failure to identify or apply the governing Supreme Court standard unquestionably falls within the "contrary to" provision of AEDPA. [Citation omitted]. . . . We . . . have not sought to draw a rigid distinction between the "contrary to" and "unreasonable application of" provisions, both of which reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme

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relevant precedent that "reasonable jurists would *all* agree is unreasonable"?

65 Crim. L. Rep. 2001 (April 7, 1999).

> Court. Indeed, we have stated that there is an overlap in the scope of the two provisions. [Citation]. Again, however, ***because the "contrary to" provision is clearly met, we need not consider whether such an overlap exists.***

MacFarlane v. Walter, 179 F.3d at 1142 (italics added).

In sum, it is unlikely that this Court's decision in *Williams* would have any impact on this case. Of course it is always possible that this Court could decide, or comment upon, related questions pertaining to the proper construction of Section 2254(d)(1) which are not set forth in the *Williams* certiorari petition. But only in the event that this Court radically narrowed the availability of federal habeas relief to state prisoners, in a way that has not been suggested by any lower federal court, would *Williams* be likely to affect the outcome of this case. In that unlikely event, this Court might consider the option of granting certiorari, vacating the judgment below, and remanding for reconsideration in light of its *Williams* decision. But there would be no need for this Court to grant certiorari in order to retain this case, so that this Court could repeat whatever holding it decides to render in the *Williams* case.

CONCLUSION

The *Bearden* principle that incarceration cannot be imposed solely because the prisoner does not have the money necessary to secure his freedom is fully applicable to this case. The holding of *McGinnis*, is that it is rational to delay the holding of a parole hearing which might

result in release from confinement provided the prisoner makes a showing of rehabilitation, until the prisoner has had the opportunity to participate in rehabilitative programs. That holding has no application at all to the present case. Since *Bearden*, and not *McGinnis*, is the controlling "clearly established Federal Law" set down by this Court, there was no error committed by the court below, and there is no conflict between *Bearden* and *McGinnis* that warrants resolution by this Court.

This Court has many times declared that its certiorari jurisdiction is to be exercised sparingly, and only in cases of peculiar gravity and general importance. *Hamilton Brown Shoe Company v. Wolf Brothers & Company*, 240 U.S. 251, 36 S. Ct. 269, 60 L.Ed. 629 (1916). Given that only one of the two county jails in these consolidated cases is still adhering to a differential good time credit policy that denies inmates the opportunity to earn the same amount of good time credit as that which exists in the state prisons, this case hardly seems like one which involves a legal dispute of national importance.

Accordingly, respondents suggest that the Court should deny the petition for certiorari in this case.

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